UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

WB SERVICES, LLC

And

Case No. 4-CA-077889

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542, AFL-CIO

David Rodriguez and Henry Protas, Esqs.
for the General Counsel.

Paul Ordynski, Pro Se,
for the Respondent.

Louis Agre, Esq. (Fort Washington, Pennsylvania)
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on September 19, 2012. The Charging Party, Local 542 of the International Union of Operating Engineers filed the charge on March 30, 2012. The General Counsel issued the complaint on July 18, 2012. The General Counsel alleges that Respondent, WB Services, LLC, discharged its employee, Herminio Rivera, on March 16, 2012 because he engaged in union activities. Thus the General Counsel alleges that Rivera's discharge violates Section 8(a)(3) and (1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, WB Services, LLC, transports waste in Pennsylvania and Delaware and other states. It annually purchases and receives goods at its Philadelphia, Pennsylvania facility valued in excess of \$50,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Union of Operating Engineers, Local 542, is a labor organization within the 10 meaning of Section 2(5) of the Act.

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II. ALLEGED UNFAIR LABOR PRACTICES

In August or early September 2011 the Union began an organizing drive at WB Services' Philadelphia facility. On September 11, it filed a representation petition. A representation election was conducted on about October 21, 2011. The Union won this election by a vote of 19-6, and was certified as the exclusive bargaining representative of a unit of Respondent's employees, which included drivers of Respondent's trucks.

The Union submitted a request for information to the Respondent on November 1, 2011, GC Exh. 5. Among the items requested were the names of all current employees, the date of the completion of any probationary period and any records of discipline. Respondent provided this information on February 28, 2012, after the Union had filed an unfair labor charge alleging a violation of Respondent's duty to bargain with respect to the information request.

The Union and Respondent began collective bargaining negotiations on December 14, 2011. As of September 19, 2012, approximately 12-15 bargaining session had been held but the parties had not reached agreement on a collective bargaining agreement. Respondent in its brief states that the parties reached agreement on a contract on October 26, 2012 and that unit employees ratified the agreement on November 1, 2012. I take this representation at face value although it is not record evidence.

On December 5, 2011, Herminio Rivera began working for Respondent as a truck driver. Rivera had previously belonged to a Teamsters Local. He contacted Local 542 Organizer Frank Bankard in January offering to serve as a conduit between the Union and Respondent's employees, particularly those whose principal language is Spanish. Rivera and Bankard discussed scheduling a meeting between bargaining unit members and Local 542 representatives.

Respondent's February 28 response to the Union's information request indicated that 40 Rivera's probationary period would expire on March 4, 2012. It also indicated that Rivera had received only one discipline warning, for being late to work on February 21, 2012.

On March 10, 2012, the Union held a meeting, as discussed previously by Rivera and Frank Bankard. Rivera distributed flyers to at a landfill and the yard to which the drivers reported, informing other unit employees of the meeting. There is no direct evidence that Respondent was aware that Rivera was distributing these flyers. Ten to twelve employees attended the meeting, including Herminio Rivera. During the meeting Rivera translated some material into Spanish. There is no evidence that Respondent was aware that Rivera attended the meeting.

On March 13, Liz Buckley, an administrative employee of Respondent, sent an email to Respondent's Chief Financial Officer, Paul Ordynski, GC Exh. 3. In this email, she noted that Herminio Rivera's probation was up on March 4, so that he should not be paid as a probationary employee. However, she noted, "Rafael [Bulawa, Respondent's maintenance manager] does not want to remove him from probation yet. I don't want us to have issues going forward because of this, is that ok?"

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There is no evidence that Paul Ordynski responded to Buckley. There is also no evidence that Respondent in fact extended or put Rivera back on probation.

Respondent scheduled a safety meeting for the late afternoon on Friday, March 16, 2012 at its facility. It invited several union representatives to attend this meeting. The union representatives arrived at Respondent's facility at about 4:20 p.m. At about 4:45 Herminio Rivera approached the union representatives and engaged them in conversation. Respondent's Chief Financial Officer, Paul Ordynski, observed Rivera talking to the union representatives.

The safety meeting started shortly after 5:00 p.m. 20-25 of Respondent's drivers, four representatives of the Union, and four members of management attended the meeting. When seated in Respondent's conference room, Bart Houck, who was to service Respondent for the Union, offered the drivers union stickers. Rivera was the first employee to take one.

Paul Ordynski conducted the meeting and discussed the need for drivers to wear seat belts. Rivera translated some of what Ordynski into Spanish. The meeting may have lasted as long as an hour to an hour and a half.

As soon as the meeting ended, Ordynski went to his office and summoned Rivera. Rafael Bulawa, Respondent's maintenance manager, was also in the office. Ordynski was aware that Bulawa had suggested extending or reinstating Rivera's probationary period. Bulawa repeated that suggestion after the safety meeting on March 16. However, Ordynski told Bulawa he was going to terminate Rivera's employment instead.

When Rivera arrived at the office, Ordynski fired him and refused to give Rivera a reason for his termination.

We called him in the office. I told him he was terminated. He asked me why. I said because you're on probation and therefore there doesn't have to be a reason why.

He pressed me why. He asked Rafael why. Rafael said it's Paul's decision. He pressed me why again. I said you're on probation. We don't—I—at that point I didn't really know the reason why, because I hadn't even looked in Herminio's personnel file.

I really knew what was—nothing that was going on. All I knew was that his probation was going to be extended. I didn't think that made sense. So I made the decision to terminate him.

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Tr. 157.1

Later on the evening of March 16, union representatives went to dinner with representatives of management. Prior to going to dinner, Paul Ordynski reviewed Rivera's personnel file for the first time, Tr. 158-59.² At dinner union organizer Frank Bankard asked Ordynski why he fired Rivera. Ordynski told Bankard that Rivera had had an accident. Bankard responded that Respondent did not provide information regarding an accident in its February 28, 2012 response to the Union's information request. There was also some discussion as to whether Rivera's probationary period had ended.

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On March 20, four days after Ordynski fired Rivera, Ordynski sent the Union an email with several attachments. One was a handwritten note purporting to be a record of Rivera's tardiness between January 24, 2012 and March 9, 2012. This note listed 18 instances of tardiness, but indicated that Respondent issued Rivera a warning on only one of these occasions. The note also listed a no call/no show on February 27, 2012.³ Respondent also attached an unsigned notice referencing this alleged violation. There are no similar notes for other drivers despite the fact that if they exist they would have had to have been produced pursuant to the General Counsel's and Union's subpoenas. Based on this fact, I infer that such notes were prepared only for Rivera.

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Also attached to the email was a notification signed by Rivera regarding an incident in which he backed into another vehicle on January 10, 2012⁴ and a notification/verbal warning about going to a site in Delaware to which he had not been dispatched. Respondent's dispatcher, Mohammed Diawara, prepared the list of tardiness instances at the request of Paul Ordynski. While Diawara could not recall the date that the list was prepared I infer that it was prepared after Ordynski fired Rivera, GC Exh. 11, Tr. 193.

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None of the information attached to the March 20 email was produced by Respondent in its February 28, 2012 response to the Union's November 1, 2011 information request. Finally, I credit Herminio Rivera's uncontradicted testimony that management, in the person of Mohammed Diawara, spoke to him about being tardy on only one occasion, Tr. 167. Diawara complained to his superior, Rafael Bulawa, only once about Rivera being tardy, Tr. 214.

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¹ Although it is not clear from the record, Ordynski apparently works in Chicago. He flew to Philadelphia the afternoon of March 16, to attend the safety meeting.

² I do not credit Paul Ordynski's testimony at Tr. 159 that he discovered that Rivera had been late a number of times when he reviewed Rivera's personnel file on March 16. There is no evidence that there was any documentation other than the February 21 warning in Rivera's file on March 16. The list of other occasions of tardiness in G.C. 11 was prepared by Mohammed Diawara afterwards, Tr. 193.

Respondent's brief also suggests that Ordynski did not know that the employee who Ordynski observed talking to union representatives prior to the meeting, translating for the Spanish employees and requesting the union sticker was Rivera. I infer that Ordynski did know this before he fired Rivera.

³ If a driver calls in after his shift has started, Respondent considers this to be a no call/no show, Tr. 190-91.

⁴ This incident was sufficiently inconsequential that Diawara, who gave the written notification to Rivera, could not remember any specifics regarding the accident, Tr. 188.

⁵ I also credit Rivera's testimony that he called Diawara before his arrival at work to tell Diawara that he would be late.

Respondent recalled Herminio Rivera to work in August 2012, apparently without paying him backpay for the five months he was apparently out of work. Moreover, this case is far from moot due to the possibility that Respondent will terminate Rivera again for discriminatory and pretextual reasons.

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Analysis

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

The General Counsel's initial showing usually requires him to prove that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. The National Labor Relations Board may infer discriminatory motive from the record as a whole and under certain circumstances, indeed not uncommonly, infers discrimination in the absence of direct evidence.

There is no question that Herminio Rivera engaged in union activity by talking to union representatives before the March 16, 2012 meeting and asking or accepting the offer of a union sticker. Respondent knew of this activity in that it occurred right in front of management, including Paul Ordynski, who made the decision to fire Rivera immediately after the meeting. Infer animus and discriminatory motivation from the timing of Rivera's discharge and the absence of any credible nondiscriminatory explanation. *Montgomery Ward & Co.*, 316 NLRB 1248, 1254 (1995).

The fact that Respondent, by Rafael Bulawa, was considering extending or reimposing Rivera's probationary period, but that Ordynski terminated Rivera instead, is critical evidence that Ordynski knew that it was Rivera who engaged in union activities in his presence. It is also

⁶ At page 2 of its brief, Respondent states that Paul Ordynski had no knowledge of Rivera's union activities when he discharged Rivera. Talking to union representatives, participating in a meeting with union and employer representatives and accepting a union sticker are activities protected by the Act. Ordynski asserts he did not know that the employee who did these things in front of him was Rivera. I find that he did know this when he terminated Rivera's employment. For one thing, as the General Counsel points out, Rafael Bulawa did not corroborate Ordynski's testimony that Bulawa had to point Rivera out to him.

⁷ I reject Paul Ordynski's testimony that he was planning to terminate Rivera prior to the March 16 meeting. There is no documentation of such a decision, such as, for example, a response to Liz Buckley's March 13 email, or instructions to Rafael Bulawa to terminate Rivera. None of Respondent's other managers were aware of Ordynski's alleged plan to discharge Rivera prior to the March 16 meeting. Bulawa, in fact, argued for extending Rivera's probationary period after the March 16 safety meeting. Moreover, the termination occurred after Ordynski witnessed Rivera's union activities.

evidence of his animus towards Rivera's union activities and discriminatory motive in Ordynski's termination of Rivera.

In this regard, GC Exhibit 7 indicates that Respondent kept a number of employees on probation beyond 90 days of their hiring date. The decision to terminate Rivera, instead of extending his probationary period, constitutes disparate treatment compared to employees who were not known to have actively engaged in union activities. In the absence of a explanation of why Rivera was treated disparately, I infer Ordynski's knowledge of Rivera's union activities, animus towards them and discriminatory motive in terminating Rivera, *New Otani Hotel & Garden, 325 NLRB 928 fn. 2 (1998); Fluor Daniel, Inc., 304 NLRB 970 (1991); Citizens Investment Services Corp., 342 NLRB 316, 330-331 (2004).*

To the extent the Respondent put forth an alternative explanation, I find it to be pretextual and therefore additional evidence of animus and discriminatory motive, *LaGloria Oil & Gas Co.*, 337 NLRB 1120, 1223-24 (2002). Virtually all of Paul Ordynski's justification for Rivera's discharge is based on facts or alleged facts of which he was unaware at the time of the discharge. Thus, having already found that the General Counsel has made an initial showing of discrimination, I conclude that Respondent has not met its burden of proving that it would have fired Rivera in the absence of his union activities

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Whether or not Rivera was still a probationary employee or not at the time of his discharge is irrelevant to the resolution of this case. It is just as much a violation of Section 8(a)(3) and (1) to discharge a probationary employee for union activity as it is to discharge a non-probationary employee, *Montgomery Ward & Co.*, 316 NLRB 1248, 1249 n. 10 (1995).

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Conclusion of Law

By discharging Herminio Rivera on March 16, 2012, Respondent violated Section 8(a)(3) and (1) of the Act.

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⁸ In addition to the evidence specifically pertaining to Herminio Rivera's discharge there is other uncontradicted evidence establishing Respondent's animus towards union supporters. However, the evidence of discriminatory motive directly relating to Rivera's discharge is so compelling, I need not rely on evidence pertaining to other employees in order to decide this case. One example is the uncontradicted testimony of Noah Melton that agents of Respondent let the air out of his truck tires in retaliation for his support of the Union, Tr. 143. Another example is Frank Bankard's uncontradicted testimony that Paul Ordynski told him that Ordynski fired employee Elijah Lebron because Lebron told other employees that the Union had been responsible for his being able to take his vacation, Tr. 148.

As noted in the General Counsel's brief, Respondent's discriminatory motive is not disproved by the absence of evidence of discrimination against other union supporters, *Audubon Regional Medical Center*, 331 NLRB 374, 376 (2000). This particularly true in the instant case where Herminio Rivera's union activities were far more open and notorious than that of others who supported the Union. Furthermore, as a probationary employee he was much more vulnerable to discriminatory treatment than employees who had worked for Respondent for a longer period of time. Finally, since 19 drivers out of 25 voted for the Union in the representation election, Respondent could probably not have operated its business if it took discriminatory measures against all those drivers it suspected of supporting Local 542.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Herminio Rivera, it must make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, WB Services, LLC, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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- (a) Discharging or otherwise discriminating against any employee for supporting
 Local
 542 of the International Union of Operating Engineers, or any other union.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- 35 (a) Make Herminio Rivera whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.
- (b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Herminio Rivera in writing that this has been done and that the discharge will not be used against him any way.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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- (d) Within 14 days after service by the Region, post at its Philadelphia, Pennsylvania facility copies of the attached notice marked "Appendix" in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 16, 2012.
- (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 9, 2012

Arthur J. Amchan
Administrative Law Judge

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Union of Operating Engineers, Local 542, or any other union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

Having already reinstated Herminio Rivera, WE WILL make Herminio Rivera whole for any loss of earnings and other benefits resulting from his discharge and subsequent unemployment, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful[discharge of Herminio Rivera and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

		WB SERVICES, LLC		
		(Employer)		
Dated	By			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404

(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS

NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.